United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1239

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1239

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UNITED STATES OF AMERICA,

Plaintiff- Appellee,

v.

ROBERT WORTHINGTON,

Defendant-Appellant.

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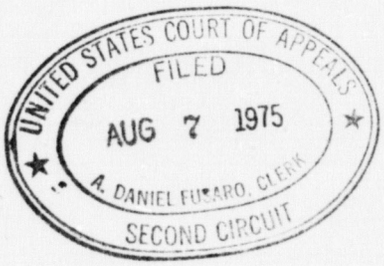
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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BRIEF FOR APPELLANT ROBERT WORTHINGTON

STATEMENT OF THE CASE

Appellant, Robert Worthington, appeals from a judgment of conviction in the United States District Court for the Southern District of New York on nine counts of an eleven count indictment (A 5-6*) charging the defendant with making false statements and reports upon applications for loans and credit submitted for the purpose of influencing the actions of banks, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and with aiding and abetting same, 18 U.S.C. Sections 1014 and 2, after a trial before a jury and the trial judge, the Honorable Charles H. Tenney, United States District Judge.

THE FACTS OF THE CASE

The appellant was charged in the indictment with unlawfully,

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* Numbers in parentheses, unless otherwise indicated, refer to pages of the Appendix.

wilfully and knowingly making a false statement and report upon applications for loans and credits submitted in the names, on the approximate dates, and to the banks set forth below, for the purpose of influencing the action of said banks, the deposits of which were then insured by the Federal Deposit Insurance Corporation: R. Theodore Worthington, September 1, 1973, Bankers Trust Co.; R. Theodore Garris, October 1, 1973, First National City Bank; Elliot Samach, February 13, 1974, Bankers Trust Co.; Robert Worthington, April 29, 1974, Bankers Trust Co.; Elliot Samach, May 17, 1974, Bankers Trust Co.; Philp Nolan, May 24, 1974, Bankers Trust Co.; Philip W. Friedman, June 20, 1974, Bankers Trust Co.; Ahmet Edmans,Sr., June 25, 1974, Bankers Trust Co.; Eliot M. Samach, September 10, 1974, First National City Bank; Joseph A. Semper, September 12, 1974, Bankers Trust Co.; Phill R. Nolan, September 18, 1974, Bankers Trust Co., the same being alleged to be violations of Title 18, United States Code, Sections 1014 and 2.

A jury was impanelled, and trial commenced on May 16, 1975.

After the selection of the jury and prior to the taking of testimony before the jury on May 19, 1975, defense counsel requested the trial judge in the robing room, as follows:

> " MR. STOLZAR: Before we start, in view of the fact that we may require some of the witnesses to testify to the commission of acts which might lead to their own indictment, if they

are not represented by counsel, have not been advised by counsel, I wonder if your Honor would be good enough to apprise them of their constitutional rights in this instance before they testify." (A 60)

The Court agreed and said:

" The only thing I can do is have you notify me of those cases where the fellow is apprised of the fact that he can be prosecuted and his testimony used against him. If you will notify me before the witness is called I will excuse the jury." (A 61)

To which the government's counsel replied:

" I will err on the side of caution and just notify him with respect to any witness whose application was submitted in conjunction with Mr. Worthington's activities. Some are innocent as far as the government knows and some knew exactly what they were doing.
" But I think it would be advisable to do it in the case of all." (A 61-62)

In effect the Court so ordered. (A 62)

Certain of the witnesses were not so advised, nor did the government advise counsel for the defendant or the Court, as thus agreed.

On May 16, 1975, after the selection of the jury, but not in the presence of the jury, and on May 20, 1975, testimony was taken with respect to photograph use for identification of the defendant. The Court did not render a decision thereon, but during the trial identification of the defendant was made in the courtroom by certain of the witnesses to whom photographs of the defendant were shown prior to the

trial, all to the defendant's prejudice.

On May 21, 1975, defendant moved to suppress certain documentary evidence (Government's Exhibit 19*), which defendant claims was unreasonably seized. The Court elected to treat this as a motion for a mistrial, which the Court denied. (A 118-119)

The defense moved at the close of the government's case and again after defendant rested to acquit the defendant on each and every count in the indictment on the ground that the government had failed to prove the defendant guilty beyond a reasonable dount on any of the eleven counts. (A 130, A 131) Both motions were denied.

On May 22, 1975, the jury returned a verdict of guilty on counts 1, 2, 4, 5, 7, 8, 9, 10, and 11. (A 132, A 42) The Court, on its own motion, dismissed counts 3 and 6. (A 42)

Defendant's motion then to set aside the verdict of the jury on counts 1, 2, 4, 5, 7, 8, 9, 10, and 11 as against the weight of the evidence was denied. (A 133)

On June 19, 1975, defendant was sentenced to two years on each of counts 1, 2, 4 and 5, to run concurrently with each other, and two years on each of counts 7, 8, 9, 10 and 11, to run concurrently with each other and consecutively with counts 1, 2, 4 and 5. Execution of sentence on counts

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* Hereinafter all Government Exhibits will be referred to as "Ex (numeral)" or as "Exhibit (numeral)"

7, 8, 9, 10 and 11 was suspended, and the defendant was placed on probation for a period of three years on each of counts 7, 8, 9, 10 and 11 to commence on the expiration of confinement on counts 1, 2, 4 and 5, subject to the standing probation order of the Court below.

On June 20, 1975, defendant's Notice of Appeal to this Court was filed.

ISSUES PRESENTED

1. Whether the evidence adduced by the government was sufficient to give the case to the jury or to sustain the jury's verdict.

2. Whether the introduction of certain documents into evidence violated the defendant's rights under the Fourth Amendment to the Constitution of the United States.

3. Whether the use of photographs for identification of the defendant in this case was so impermissively suggestive and so prejudicial to the defendant as to deny the defendant a fair trial and due process.

4. Whether the failure of the government to advise the Court and defense counsel as to which witnesses had not been advised of their constitutional right not to testify denied defendant a fair trial and due process.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the United States Constituion

provides:

> " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, Section 1014 of the United States Code provides:

> " Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise . . . shall be fined not more than $ 5,000 or imprisoned not more than two years, or both."

Title 18, Section 2 of the United States Code provides:

> " (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> " (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING DEFENDANT'S MOTIONS MADE AT THE CONCLUSION OF THE GOVERNMENT'S CASE AND AFTER THE DEFENSE RESTED TO ACQUIT THE DEFENDANT ON EACH AND EVERY COUNT FOR THE GOVERNMENT'S FAILURE TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT AND MADE AFTER THE JURY RETURNED ITS VERDICT TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Court below, in charging the jury, described five elements which the government must prove beyond a reasonable doubt in order to convict the defendant as charged in the indictment. (A 15) We are here generally concerned with the first, second and fourth such elements, although the third is crucial as hereinbelow noted. The fifth element relating to the banks' deposits being insured by the Federal Deposit Insurance Corporation was concede. As stated by the Court

> " First, that the defendant himself made, or that he aided and abetted another to make, or caused to be made, a false statement or report upon or in an application for a loan to a bank.
> " Second, that he did so for the purpose of influencing in any was a bank's action in approving a loan.
> " Third, that the statement was false as to a material fact.
> " Fourth, that the defendant acted knowingly."

A review of the testimony adduced and exhibits in evidence as to each of the nine counts on which defendant was convicted will show that one or more of these elements was not proven beyond a reasonable doubt, if there was any proof at all.

As to Count 1

This count relates to an application to Bankers Trust Company dated September 1, 1973 in the name of R. Theodore Worthington. (Ex 1A) The record is almost devoid of testimony concerning this count. Basically all that appears in the record is that Exhibits 1, 1A, and 1B relating to this count are records of Bankers Trust Company kept in Bankers Trust

Company's files (A 63) and the testimony of the government's handwriting expert, Luciano Caputo, that he included all of the writings on the face of Exhibit 1A and the bottom of Exhibit 1B (A 120) in arriving at his opinion that all of the documents (to the extent included by him) were prepared by one and the same person. (A 121) Mr. Caputo at no time ever named that person. He did not, however, include in his analysis any of the exemplars of defendant's handwriting written in his presence and at his direction (Defendant's Exhibit A) (the only writings of defendant in this case as to which there is no dispute as being defendant's) for the reason that, because the subject was nervous the exemplars did "not represent his normal writing habit and pattern". (A 124-125) But see the lameness of this excuse for not using the exemplars when Caputo testified on cross-examination that, if the person writing is nervous or elated or dejected, still the same characteristics would come out to a degree. (A 126) The validity of Caputo's conclusion is also shrouded in doubt when his testimony concerning authorship of the signatures on Exhibits 10A and 10B (A 127-129) is in direct conflict with the government's witness who was the author of the signature on Exhibit 10A (A 103) and who disclaimed the signature on Exhibit 10B (A 101) which was purportedly his.

Thus, there is nothing on the record as to who in fact prepared or presented the application, or as to the purpose (the second element), or as to defendant's knowing action (the fourth element), and as to who in fact wrote it; all there is is the testimony of Caputo, which patently must leave reasonable doubt as to the authorship of the documents involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 2

This count relates to an application to First National City Bank dated October 1, 1973 in the name of R. Theodore Garris (Ex 2). The record contains very limited testimony as to this count.

Bernard Batchellor, an employee of First National City Bank (A 80) testified that he knew R. Theodore Garris and saw him many times at the bank and outside the bank, and discussed loans applications or checking accounts with him (A 81) and that he had a loan application pending with the First National City Bank (A 82) (emphasis supplied). He also identified the defendant in the courtroom as Garris. (A 82) When shown Exhibit 2, a question was asked by the government

and answered as follows:

> " Q That is a loan application placed with the First National City Bank on October 1, 1973, is that correct ?
> " A Yes." (A 82) (emphasis supplied)

Batchellor did not testify that Exhibit 2 was given to him by the defendant (nor in fact is there any testimony as to the source of this application), nor did he testify that defendant wrote or signed it. Nor is there any testimony that "Garris" is not properly or legally used by defendant as his name.

We are thus relegated to the handwriting expert's testimony for the authorship of this document, and the discussion hereinabove in this respect as to Count 1 is equally applicable here.

Thus, there is nothing on the record as to who in fact prepared or presented this application, or as to the purpose (the second element), or as to defendant's knowing action (the fourth element), and as to who in fact wrote it; all there is is the testimony of Caputo, which patently must leave reasonable doubt as to the authorship of the document involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 4

This count relates to an application to Bankers Trust Company dated April 29, 1974 in the name of Robert Worthington. (Ex 4A) The record is almost devoid of testimony concerning the substantive aspects of this count. Basically all that appears in the record is that Exhibits 4, 4A, 4B and 4C relating to this count are records of Bankers Trust Company kept in Bankers Trust Company's files. (A 63) and the testimony of Ilse Katz that she spoke to the applicant in May of 1974 (A 85) who identified himself as Robert Worthington (A 86) and whom she identified in the courtroom.

There is no testimony on the record as to the falsity of any of the information on this application. The government attempted to prove the falsity of the employment section of the application by introducing Exhibit 21, the New York Secretary of State's certificate. This, however, does not prove the non-existence, in fact, of the entity American Planning Corp. It may have been incorporated in another state or it may have been a de facto corporation.

The government did not prove beyond a reasonable doubt the fourth element set forth by the Court below. Thus the government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 5

This count relates to an application to Bankers Trust Company dated May 17, 1974 in the name of Eliot Samach. (Ex 5A)

The record is barren of any testimony which specifically identifies the authorship of this application other than Samach's testimony that he signed it in blank and gave it to defendant (A 65) or as to who actually delivered it to the bank. The only testimony as to the authorship of the application is that of the government's handwriting expert discussed hereinabove as to count 1, the discussion being equally applicable here.

There is nothing on the record as to who, in fact, presented the application, or as to the purpose (the second element) or as to defendant's knowing action (the fourth element), and as to who in fact wrote it; all there is is the testimony of Caputo which patently must leave reasonable doubt as to the authorship of the documents involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict is against the weight of the evidence.

As to Count 7

This count relates to an application to Bankers Trust Company dated June 20, 1974 in the name of Philip W. Friedman. (Ex 7A).

Philip Friedman is the birth name (and legal name) of the applicant (A 73, A78-79) although he used the name Philip Nolan as a stage name (A 73, A 78-79) (and for his performance on the witness stand). He testified that he filled out Exhibit 7A and signed it (A 71).

Friedman (Nolan) testified that he told defendant that "the information here was erroneous" (A 72), not that it was false, and not that defendant caused him to include the erroneous information. Friedman took the application to the bank himself (A 74).

There is no showing beyond a reasonable doubt that defendant aided and abetted Friedman (the first element) or as to the purpose (the second element) or that he acted knowingly (or that he acted at all) (the fourth element).

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 8

This count relates to an application to Bankers Trust Company dated June 25, 1974 in the name of Ahmet Edmans, Sr. (Ex 8A).

The record is barren of any testimony which specifically identifies the authorship of this application other than Edman's testimony that he signed it in blank (A 104) and signed the note (Ex 8C) (A 105) and that defendant said he would fill out the application (A 106) or as to who actually delivered it to the bank. The only testimony as to the authorship of the application is that of the government's handwriting expert, discussed hereinabove as to Count 1, the discussion being equally applicable here.

There is nothing on the record as to who in fact presented the application, or as to the purpose (the second element),or as to defendant's knowing action (the fourth element) and as to who, in fact, wrote it; all there is is the testimony of Caputo which patently must leave reasonable doubt as to the authorship of the documents involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 9

This count relates to an application to First National City Bank dated September 10, 1974 in the name of Eliot M. Samach. (Ex 9A)

The record is barren of any testimony which specifically identifies the authorship of this application. Samach's

testimony was that nothing was in his handwriting (A 66); he did not see defendant fill it out (A 67). There is no testimony as to who actually delivered the application to the bank other than Betty Payne's meager description of the person who delivered and discussed the application with her, but whom she did not recall clearly. (A 83, A 84) The only testimony as to the authorship of the application is that of the government's handwriting expert, discussed hereinabove as to Count 1, the discussion being equally applicable here.

There is nothing on the record as to who in fact presented the application (except for Betty Payne's testimony discussed above), or as to the purpose (the second element), or as to defendant's knowing action (the fourth element), and as to who in fact wrote it; all there is is the testimony of Caputo which patently must leave reasonable doubt as to the authorship of the document involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 10

This count involves an application to Bankers Trust Company dated September 12, 1974 in the name of Joseph A. Semper. (Ex 10A)

The record is barren of any testimony which specifically identifies the authorship of this application other than

Semper's testimony that he signed it in blank. (A 100, A 102) Neither Semper nor Antonio Milares, the bank officer, saw the application being filled out. (A 103, A 99) The only testimony as to the authorship of the application is that of the government's handwriting expert, discussed hereinabove as to Count 1, the discussion being equally applicable here.

There is nothing on the record as to the purpose (the second element), or as to defendant's knowing action (the fourth element), and as to who in fact wrote the application; all there is is the testimony of Caputo which patently must leave reasonable doubt as to the authorship of the documents involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

As to Count 11

This count relates to an application to Bankers Trust Company dated September 18, 1974 in the name of Phill R. Nolan. (Ex 4A)

The record is barren of any testimony which specifically identifies the authorship of this application other than Nolan's testimony that he signed it in blank and gave it to defendant. (A 75-76) The record is likewise barren of any testimony which specifically identifies the authorship of the co-signer's form (Ex 11B) except that Shirley Johnson

testified that she filled out the co-signer's form and signed it, and gave it to defendant (A 68), but that parts of this form were not in her handwriting (A 69-70). The only testimony as to the authorship of this application and co-signer's form is that of the government's handwriting expert, discussed hereinabove as to Count 1, the discussion being equally applicable here.

There is nothing on the record as to the purpose of the application (the second element), or as to defendant's knowing action (the fourth element), and as to who in fact wrote it; all there is is the testimony of Caputo which patently must leave reasonable doubt as to the authorship of the documents involved in this count.

The government did not sustain its burden of proof on this count, and the jury's verdict was against the weight of the evidence.

POINT II

THE INTRODUCTION INTO EVIDENCE OF EXHIBIT 19 VIOLATED DEFENDANT'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Government's Exhibit 19 consisting of a BankAmericard bearing signature "Robert Worthington", a Chemical Bank Master Charge card bearing signature "Theodore R. Garris", an American Express card bearing signature "R. T. Worthington", a driver's license bearing signature "R.W. Garris", a check

dated August 6, 1974 bearing signature "R. Theodore Garris", an A T & T Credit Card bearing signature "Ralph I. Preuss", a Mobil Oil charge slip bearing signature "R. Theodore Garris", blank checks of American Planning Co. of N.Y. Inc., Howard Printz, Inc., E.M.S. Sales Corp. and R. Theodore Garris and check records for the R. Theodore Garris account.

Steven Bursey, a Special Agent for the Federal Bureau of Investigation (A 107) testified that on November 11, 1974 he arrested defendant. (A 107) Then in December, 1974 Bursey encountered defendant in Brooklyn, New York on Atlantic Avenue. (A 109) He, Bursey, did not have an arrest warrant, but had an authorization to arrest granted by the United States Attorney's office. (A 114-115) Bursey and defendant then proceeded to Manhattan and in Manhattan Bursey asked Worthington to produce his wallet and asked to examine his briefcase. (A 110, A 111) Bursey did not advise defendant as to his Fourth Amendment rights. (A 113) Government's Exhibit 19 were the documents produced by defendant on Bursey's request. Counsel for the government pointed out to the Court below that these cards were important to this case because these were the signatures used on the applications, and had " little relevance to the other case. . . . nothing to do with the arrest or circumstances of the other charge. Merely that these were in his possession . . .".(A 108)

Defendant objected to the introduction into evidence of this Exhibit 19 (A 111, A 115) and the Court below overruled the objection (A 115). A short recess was then called while the jurors examined these documents. (A 116-117) During the recess defendant made a motion to suppress Exhibit 19 on the ground of unreasonable search and seizure and on the ground that the items in said exhibit were not evidence of a crime. (A 118) The Court indicated his understanding of the original objection (A 118) which was an erroneous understanding, and then decided that since the jury had already examined the items comprising Exhibit 19, it was too late to suppress them. (A 119); and treated this as a motion for a mistrial, which he denied. (A 119).

Then the government's very next witness, the handwriting expert testified to his use of Exhibit 19 in his analysis and in arriving at his conclusion (A 122, A 123, A 124) and he included parts thereof in his chart, Exhibit 20, as to which he testified at great length. (See items of Exhibit 20 numbered 3, 5, 8, 27 and 40.)

A clear and concise summary of the matter of unreasonable searches and seizures appears in Handbook On The Law of Search And Seizure, prepared by the Legislation and Special Projects Section, Criminal Division, Department of Justice, February 1971 (Revised), which ". . . is designed as a general set of guidelines for personnel of Government agencies performing

law enforcement or investigative functions. Its purpose is to provide ready access to the main threads of the law in the area of search and seizure in order to assist agents when confronted with problems requiring quick decisions." (page iii) This handbook is for sale by the Superintendant of Documents, U.S. Government Printing Office, Washington, D.C.

Excerpts from the text pertinent to the instant case follow:

> " B. SEARCH INCIDENTAL TO ARREST
> 1. General rule:
> In the course of a lawful arrest, an agent may search the arrested person for contraband, fruits, intrumentalities, and other evidence. This applies both to felonies and to misdemeanors where the accused is lawfully taken into custody.
> " An arrest may not be used simply as an excuse to conduct a general search for evidence. Even if an agent makes a valid arrest, this cannot be used as an excuse to search a person for evidence of a different offense for which the agent had (1) no arrest warrant, (2) no probable cause to arrest, and (3) no search warrant. (Courts are particularly suspicious in cases involving searches incident to arrests for minor traffic offenses.)
> "2. Why a search is allowed
> A search incident to an arrest is allowed:
> a. To protect the arresting agent;
> b. To prevent escape or suicide; and
> c. To prevent the destruction of evidence.
> "3. The arrest must be lawful
> a. If the arrest is unlawful for any reason, the incidental search of the arrested person is also unlawful, and any fruits of such a search will be inadmissible in court. Since arrests made without a warrant are attacked in court almost routinely, it is advisable to get a search warrant if possible. " (Pages 14-15)
> . . .

"5. When the search can be conducted . . .

"b. A search made incidental to an arrest is not reasonable unless it is made contemporaneously with the arrest.

i. To be contemporaneous, a search must be conducted as soon as practical after the arrest. . . .

ii. The reason for this rule is that the law gives an agent a right to search the person of one lawfully arrested only (1) to protect himself, (2) to prevent escape, or (3) to prevent the destruction of evidence. If an agent delays a search, it appears that he was not concerned about any of those three possibilities, and that he conducted the search for some other reason." (Pages 16-18)

. . .

"A. THE EFFECT OF A PERSON'S CONSENT TO A SEARCH

"1. A person's consent to search by an agent waives his fourth amendment right to be free from a search without a warrant. Therefore, a search based on consent is lawful, even where there is no other justification for the search, if:

a. The consent is made with knowledge of the right not to consent to a search;

b. The consent is voluntary-freely given without duress or coercion; and

c. The consent is clear and explicit.

"2. Any waiver of a constitutional right will be examined carefully by the courts. Therefore, before evidence discovered as a result of a consent search will be admitted at a trial, the Government will have to show by "clear and convincing" evidence that the consent was, in fact, freely and voluntarily given by a person who was aware of his right not to consent.

"B. THE NECESSITY THAT THE PERSON BE AWARE OF HIS RIGHTS

"1. An agent should explain to the person that he has a right not to have a search made of his premises without a warrant, and that he has a right to refuse to consent to the search without a warrant. . . . ." (Pages 39-40)

Applying the Department of Justice's own guidelines set forth above, the search and seizure of defendant and defendant's documents were illegal and unreasonable. While the government may contend that the search was incidental to a lawful arrest (on an indictment not involved in the instant case), there is serious doubt that the arrest was lawful, there being no warrant and no proof of an authorization to arrest defendant, and that the search was incidental to the arrest. The search was not conducted for the reasons set forth above as to why a contemporaneous search is allowed. This becomes abundantly clear in the light of the fact that the arrest was made in Brooklyn and the search made about twenty minutes later in Manhattan (not contemporaneously with the arrest) after the defendant had accompanied Bursey without incident. The fact that defendant produced the items in question on Bursey's request does not render the search lawful, since it really was not voluntary, Bursey not having advised defendant of his constitutional rights under the Fourth Amendment (A 112-113). Furthermore, the items seized were not evidence of a crime. They were used in this case solely for evidentiary purposes for handwriting analysis as government's counsel intimated to the Court below (A 108).

Exhibit 19 was, therefore, the fruits of an unlawful search and seizure (see, Harris v. U.S. (1947) 331 U.S. 145,

154, 91 L. Ed. 1399, 1407), which the government was not entitled to use against the defendant in its affirmative case. Boyd v. U.S. (1886) 116 U.S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524; Weeks v. U.S. (1914) 232 U.S. 383, 58 L. Ed. 652.

The Court below could and should have overcome the problem of the jury's having seen the documents comprising Exhibit 19 by simply directing the jury to disregard them, as the Court would ordinarily do with respect to any other testimony or evidence that was objectionable. The problem was compounded when the jury requested and received all the exhibits, including Exhibit 19, during the jury's deliberations. (A 40)

Then, too, as pointed out above, the government's very next witness used the forbidden fruits in his analysis, testimony and conclusion. Certainly the jury must have given great weight to this testimony and Exhibit 19 in order to arrive at its guilty verdicts.

Thus, the introduction of the forbidden fruits of an unlawful and unreasonable search and seizure violated defendant's Fourth Amendment rights and deprived him of a fair trial and due process.

POINT III

THE USE OF PHOTOGRAPHS IN THIS CASE WAS IMPERMISSIVELY SUGGESTIVE AND RESULTED IN A DENIAL OF DUE PROCESS TO DEFENDANT.

The use of photographs to identify defendant in this case was in various ways impermissively suggestive.

There was repetitious showing of photographs of defendant, as well as arrays designed to have defendant's photographs stand out, to witnesses who later identified the defendant in the courtroom during the trial. This repetitious showing of photographs of the defendant and arrays of this nature served to reinforce the memory or to create a memory of these witnesses as to the appearance of defendant, or to conjure up a vision of defendant, so that at the somewhat later trial the witnesses could and did identify the defendant in the courtroom.

Antonio Milares, who identified defendant in the courtroom (A 95) saw defendant for about 4 or 5 minutes on or about September 12, 1974 (A 96, A 97, A 98), and again a week later for 45 seconds to 1 minute (A 91). He was shown photographs by Mr. DeFillipi of the bank's security division, about five pictures, a mixture of blacks and whites (defendant is black) and then a single photograph of defendant approximately two weeks later (A 92, A 93, A 94). Special Agent Shea of the Federal Bureau of Investigation showed him one photograph (not a spread) about one week thereafter (A 93, A 94).

Ilse Katz, who identified defendant in the courtroom (A 86), saw defendant in May of 1974 (A 85). She was shown an array of six Negro male photographs by James A. Shand, an investigator for Bankers Trust Company, on September 27, 1974 (A 43), but she was not sure of her photo identification at that time (A 44, A 46).

Joseph Angelon, who identified defendant in the courtroom (A 89), saw defendant for about five minutes on or about September 18, 1974 (A 88, A 89), and never saw him again (A 90). Either Shand or DeFillipi showed him a grouping of photographs a few days after September 18, 1974, but was unable to make an identification at that time. (A 56-57). When shown Shand's array in the courtroom during the evidentiary hearing on the motion, Angelon could recognize only defendant's photograph as having been in the array shown him the first time, although he did not make the identification when first shown the array. (A 57) About a week later DeFillipi showed Angelon about five other photographs, smaller pictures, all of black males, like police pictures. (A 58) It should be noted here that at the hearing on the motion Angelon stated that he saw the person to be identified for a couple of minutes (A 58) rather than for the five minutes to which he testified at the trial (A 89).

Joyce Austin, who identified defendant in the courtroom (A 87) saw defendant on two occasions for a total of about fifteen, twenty minutes (A 59). Shand showed her a photograph of Philip Nolan, a male caucasian, on September 27, 1974, which she identified (A 47), and then showed her an array of six black males (including defendant), but she did not identify defendant's photograph (A 48). On April 23, 1975, Bursey showed her the spread of photographs and she identified defendant. (A 51-52) Both Bursey's spread and Shea's spread were on the table at the time (A 50) and defendant was the only one whose photograph appeared in both spreads (A 55). Bursey's spread consisted of four full face only photographs and two with full face and profile combinations, one of the latter of which was a combination photograph of defendant. (A 53, A 54) Shea's spread consisted of six photographs, five of which bore on their faces the notation that they were New York City Police Department photographs and one, the only one, that of defendant bore no notation on its face of the source. (A 49)

The repetitious showing of defendant's photograph to the witnesses, as well as the nature of the showing and the make-up of the arrays, witnesses who were later to testify and identify defendant in the courtroom at the trial, was impermissively suggestive and was prejudicial

to the defendant and resulted in a denial of due process at the trial.

It is further to be noted that, although the motion relative to the matter of photographic identification was timely made and the Court below stated that he would dispose of this matter in advance (A 42a, A 42b), the Court never made or communicated any decision thereon, but allowed the identification to proceed at the trial as indicated above.

POINT IV

THE FAILURE OF THE GOVERNMENT TO ABIDE BY ITS UNDERTAKING TO ADVISE THE COURT AS TO WITNESSES WHO HAD NOT BEEN ADVISED OF THEIR CONSTITUTIONAL RIGHT NOT TO TESTIFY DEPRIVED DEFENDANT OF A FAIR TRIAL AND DUE PROCESS.

As set forth above at Pages 4-5, the government undertook to advise the Court as to which witnesses whose testimony might lead to their own indictment, not represented by counsel, had not been apprised of their constitutional right not to testify, and the Court undertook to advise such witnesses of this constitutional right when so informed by the government.

The witnesses, Elliot Samach, Philip Nolan (also known as Philip W. Friedman), Ahmet Edman and Joseph A. Semper, were all witnesses who might have been indicted for the same crimes as defendant was in this case. Reference is made to the Court's charge to the jury in this respect. (A 18)

Elliot Samach was the only witness advised of his

rights before the trial (A 64) and he had been granted immunity (A 64). He was the only witness as to whom the Court below made inquiry about the matter of being advised before he testified. (A 64) Nolan had no counsel (A 77) and was advised only as to possible prosecution for perjury (A 77). The record is silent as to Edman and Semper, and counsel for the government was also silent. As a result the Court was also silent as to these last three witnesses named and their constitutional right not to testify. These witnesses testified at great length as to their roles and to facts which would expose them to indictments. Had they been apprised of their right not to testify by the Court, they might not have testified, and their testimony which was essential to convict defendant would not have been available to the government.

The government should not be permitted to lull the Court and defense counsel into reliance on government counsel's undertaking and then be permitted to obtain a conviction by failing to comply with that undertaking. This breach of faith, the failure of government's counsel to live up to his undertaking, resulted in prejudice to defendant and unfairness in the trial and a denial of due process.

CONCLUSION

The error of the Court below in admitting into evidence documents which were obtained in violation of defendant's constitutional rights against unreasonable search and seizure, the error of the Court below in admitting the identification testimony of witnesses to whom defendant's photographs had been shown repetitiously and with impermissive suggestiveness, and the failure of government's counsel to act in accordance with his undertaking to advise the Court with respect to witnesses who had not been advised of their constitutional right not to testify each separately prejudiced the defendant and deprived him of a fair trial and due process. The cumulative effect of these errors and omissions certainly was prejudicial to defendant and deprived him of a fair trial and due process.

Excluding the testimony and the exhibit which were erroneously admitted the government failed to sustain its burden of proof and the verdict of the jury was contrary to the weight of the evidence.

Despite the inclusion of the erroneously admitted testimony and exhibit the government failed to sustain its burden of proof and the verdict of the jury was against the weight of the evidence.

The verdict of the jury must be overturned since the government failed to sustain its burden of proof and the verdict was contrary to the weight of the evidence; furthermore the defendant did not receive a fair trial and was denied due process.

The judgment should be reversed on Counts 1, 2, 4, 5, 7, 8, 9, 10 and 11 and the indictment dismissed.

Respectfully submitted,

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